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No. 93-670

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,

Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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BIRKDALE SHIPPING CO., S.A.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Petition accurately states that Petitioner Albert Howlett, a longshoreman, slipped and fell while assisting with the discharge of cocoa beans from the No. 2 hold of the M/V PRESIDENTE IBANEZ, a vessel owned by the Respondent.[1] The Petition also accurately states

1. Petitioner filed two lawsuits, one against Respondent Birkdale Shipping Co., S.A. and one against the demise charterer of the vessel, EMPRESA MARITIMA DEL ESTADO. These lawsuits were consolidated at the district court level and the appeal to the Third Circuit was pursued against both defendants. (10a, 12a). It appears, however, that Petitioner has filed this Petition for Writ of Certiorari only against Birkdale Shipping Co., S.A., who admitted ownership of the vessel, but denied that it was in possession of the

that this accident occurred while the Petitioner was stepping down from cargo in the hold to an exposed area of the deck; the exposed area was covered with a sheet of plastic; the plastic had been placed on the deck by a foreign, loading stevedore; and the plastic was obtained by the loading stevedore from the vessel. The Petition, however, also contains several mischaracterizations of the evidence and omits several important facts.

First and foremost, there is absolutely no evidence to support a finding that the vessel's crew knew, or had reason to know, that plastic had been placed on the deck under the cocoa beans. Contrary to what is implied in the Petition, there is no evidence that the vessel's crew provided plastic to the loading stevedore *for the purpose of using it as a separation material.* In fact, the ship's Captain, Daniel Cafena, testified that he has never seen plastic used as a separation material for cocoa beans and would not have permitted it to be used for this purpose without registering a complaint since plastic can cause condensation damage to this type of cargo. (1b-7b). In addition, Captain Cafena testified that if any member of his crew saw plastic being used for this purpose, it would have been reported it to him and he would have asked the loading stevedore to remove it immediately. *Id.*

Respondent has never disputed that the plastic came from the vessel's supplies since the vessel made available all of the materials needed for stowing cargo, i.e., paper, plywood, dunnage and plastic. (3b). There is no evidence in this case, however, that the vessel knew what the loading stevedore intended to do with the plastic. Plastic can be used for a myriad of purposes in connection with the loading of cargo aboard a vessel.

NOTES *(Continued)*
vessel at the time of Petitioner's alleged accident. Since the duties Petitioner seeks to impose would only apply to the entity in possession of the vessel (i.e. EMPRESA MARITIMA DEL ESTADO) this is another reason why this Petition should be denied. *See Bjarunson v. Botelho Shipping Corp.*, 873 F.2d 1204 (9th Cir. 1989).

Furthermore, there is no evidence that plastic was used as a separation material in any other hold, or on any other deck, other than the immediate deck area where Petitioner allegedly fell. (8b-9b).

In addition, the Petition mischaracterizes the testimony of Captain Cafena regarding the duties of the crewmembers who were on deck during the loading operation. Contrary to what is stated in the Petition, Captain Cafena did not testify that "if plastic had been placed under the cocoa beans at the time cargo was loaded, the crew of the ship *would* have seen it." *See* Petition at p. 5. Instead, Captain Cafena merely speculated that if plastic was used for this purpose, the crewmembers "*should* have" observed it. (16a). Petitioner did not offer any evidence to support a finding that a crewmember *did observe* plastic being placed on the deck. As noted, the testimony of Captain Cafena actually established that if a crewmember had observed plastic being used for this purpose, it would have been reported to him. (3b, 5-6b). Also, as noted, by stating that a crewmember "should have" seen it, Captain Cafena was not speaking in terms of legal duties, but in terms of visual observations. Petitioner fails to point out that Captain Cafena also testified that the vessel's Chief Mate, who was on the deck during the loading operation, "can't be attentive to everything that is happening." (1b). In addition, on page 5 of the Petition, Petitioner states that the crew conducted "inspections," implying that the crew supervised or inspected the work of the loading stevedore. This is simply not what the evidence established. Captain Cafena testified that the crewmembers on deck were watching the cargo, watching for stowaways, watching for people stealing cargo or attempting to smuggle drugs, and generally "protecting the ship." (2b-3b, 5b). There is absolutely no evidence to support a finding that any crewmember inspected, supervised, or reviewed the work of the longshoremen working in the holds.

In addition, contrary to what is stated in the Petition, Captain Cafena did not "require" the stevedore to place a separation material under the cocoa beans. This was simply the standard practice and Captain Cafena specifically testified that the decision of whether to use wood, paper, or any other separation material, was made by the stevedore. (1b, 3-4b, 6b).

The Petition is also misleading to the extent it implies that the Respondent vessel owner knew, or should have known, that placing plastic on the deck would present a safety hazard for the discharging stevedore. There is no evidence to support this assertion. Captain Cafena did testify, as Petitioner asserts, that plastic "should not have been under the cargo." *See* Petition at p. 4. Captain Cafena, however, stated that using plastic as a separation material was improper because, and only because, it could cause damage to the cocoa beans. (6b). There is no evidence to suggest that Captain Cafena had any reason to believe that placing plastic on the deck would create a dangerous condition for the longshoremen in the discharging port. Curiously, even the Petitioner failed to offer evidence to show that placing plastic under cargo on the deck of a hold would create an unreasonable risk of harm for experienced longshoremen.

Finally, Petitioner asserts that the "dangerous condition" in question, the plastic on the deck, was not a condition that a longshoreman "should be able to anticipate." *See* Petition at p. 9. This is simply not true. When the draft of cocoa beans was lifted out of the hold immediately before the alleged accident, it exposed an area that was approximately eight foot square. *See* Petition at p. 9, n.1. The Petitioner testified that this entire area was covered by plastic. In addition, Joseph Fisher, an eyewitness to the accident, testified that he could see the plastic when he looked down at the exposed area. (8b). Furthermore, Raymond McMullen, another longshoreman, testified that he could see the plastic all the way from the top deck of the vessel. (9b).

Therefore, the district court properly held that this was a condition that could have been, and should have been, discovered by a reasonable inspection of the hold by a competent stevedore, i.e. if the Petitioner looked where he was stepping, the condition was open and obvious. (4a, 8a). This holding provided a second, independent basis for granting Respondent's Summary Judgment Motion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Respondent Concurs That There Is A Conflict Between The Third, Fifth And Ninth Circuit Courts of Appeals Regarding A Shipowner's Liability For Improperly Stowed Cargo; However, The Present Case Does Not Properly Present This Conflict For Review.

The Petition accurately states that the district court granted summary judgment in the present case, and the Court of Appeals affirmed, based upon the holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). The Petition also accurately states that the decision in *Derr* is in conflict with the decision handed down by the Fifth Circuit Court of Appeals in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), and the decision handed down by the Ninth Circuit Court of Appeals in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).[2] Furthermore, the Petition accurately states that the negligence remedy provided under §5(b) of the Longshore and Harbor Workers' Compensation Act,

2. In *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), the Court of Appeals for the Fourth Circuit did not consider or adopt the distinction Petitioner seeks to establish between a vessel owner's duty to supervise domestic and foreign stevedores. In addition, Petitioner fails to note that the Second Circuit Court of Appeals has issued an opinion consistent with the holding in *Derr*. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977).

insofar as it relates to a shipowner's responsibility for the condition of cargo stowed by an independent stevedoring contractor, is not being interpreted and/or applied uniformly throughout the country, contrary to the express intent of Congress. The present case, however, does not properly present this conflict for review because, even under the standards of care adopted in the Fifth and Ninth Circuits, summary judgment was properly granted.

A. The Third Circuit's Holding In *Derr*, As Well As The Decisions Of The Lower Court And Third Circuit In The Instant Case, Are In Complete Accord With The 1972 Amendments To The Longshore And Harbor Workers' Compensation Act And This Court's Decision in *Scindia*.

1. A Vessel Owner Does Not Have A Duty To Supervise The Loading Operation Of A Stevedore, Whether Foreign Or Domestic.

In *Derr*, the Third Circuit Court of Appeals held that a vessel owner does not have a duty to supervise or inspect the loading operation of an independent stevedore, whether foreign or domestic. In addition, the Court held that a vessel owner does not have a duty to inspect the condition of the cargo in the holds before turning the vessel over to a discharging stevedore. *Derr*, 835 F.2d at 493-95. The Petitioner in this case asserts that the Third Circuit reached these conclusions based upon an erroneous interpretation of the 1972 Amendments to the Longshore and Harbor Worker's Compensation Act and this Court's decision in *Scindia Steam Navigation, Ltd. v. DeLos Santos*, 451 U.S. 156 (1981). Petitioner asserts that a vessel owner should have a duty to inspect the cargo after the loading operation is completed. As a practical matter, therefore, Petitioner is arguing that the vessel owner has a duty to supervise the work of an independent stevedoring contractor, a duty which was specifically rejected by this Court in *Scindia*. In *Derr*, therefore, the Third Circuit properly interpreted the 1972 Amendments and this Court's decision in *Scindia*.

In *Scindia*, this Court clearly and unequivocally held that a shipowner does not have a duty to inspect or supervise the cargo operations of an independent stevedore. This Court stated that "[t]he shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Scindia*, 451 U.S. at 172 (1981). Congress' intent in passing the 1972 Amendments was "to terminate [the vessel's] automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." *Id.* at 168. Thus, this Court concluded that a vessel owner does not have a duty "to discover and correct dangerous conditions that develop during the *loading* or *unloading process*." *Id.* at 169 (emphasis added). This Court recognized that imposing such a duty "would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. . . . 'Creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would . . . saddle the shipowner will precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).' " *Id.* at 169, *quoting Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50, n.35 (3d Cir. 1977).

As the lower court pointed out in *Robertson v. Tokai Shosen K.K.*, 655 F.Supp. 152 (E.D. Pa. 1987), the companion case in *Derr*, Petitioner's effort to limit the holding in *Scindia* to domestic stevedores makes absolutely no sense:

> Now, if one may not find the vessel liable for wrongs of the off-loading stevedore under the Act, then one can no more find the vessel liable for wrongs of the on-loading stevedore – assuming for the moment that such wrongs are committed.

. . .

> If I were to adopt the position ably advocated by plaintiff's counsel, I would eviscerate *Scindia* and the Act. Otherwise, while the vessel would not be required to supervise and inspect each stevedoring operation, *Scindia*, it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault based liability of the vessel a nullity.

Robertson, 655 F.Supp. at 154-155.

The Third Circuit Court of Appeals agreed with this rationale and concluded that "the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo." *Derr*, 835 F.2d at 495.[3] The Third Circuit also

3. In a footnote, Petitioner asserts that § 412 of the Restatement (Second) of Torts is the standard which should be applied to a shipowner's responsibility for the negligence of a stevedore. This section of the Restatement, however, is an exception to the general rule regarding the liability of employers for the actions of independent contractors. The exception applies only to employers who have a duty to maintain land or chattels; it has no application in the present case and clearly does not establish the duties of a vessel owner regarding cargo loaded by an independent stevedore. If resort need be had to the Restatement for defining the duties of the vessel owner, the applicable section would be § 409, not § 412. *See, e.g., Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). Under 409, "before liability can attach for such independently created danger, the owner must have *knowledge* of its existence and an opportunity to alleviate it." *Id.* at 862 (emphasis added).

In fact, in *Scindia*, this Court rejected the principle of § 412 of the Restatement which would make the vessel owner liable for supervising the work of the stevedore:

> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. § 941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe"

noted that "the scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores." *Id.* Therefore, based upon Scindia, the Third Circuit properly concluded that a vessel owner does not have a duty to supervise or inspect the loading operation of a foreign stevedore and a vessel owner does not have a duty to inspect the cargo before turning the vessel over to a domestic discharging stevedore.

2. *The Presence Of Crewmembers On Deck During The Loading Operation Is Not Enough To Reimpose A Duty To Supervise The Work Of An Independent Stevedore.*

In Section 2 of his Petition, the Petitioner seeks a Writ of Certiorari regarding a more narrow aspect of the *Derr* decision. In *Derr*, the Third Circuit Court of Appeals rejected the argument that mere "observation" of the loading operation by members of the crew is sufficient to hold a vessel owner liable for conditions that might be created by the longshoremen working in the holds. *Id.* at 494. The Third Circuit recognized that if "observation" on deck is sufficient to impose liability, this would effectively require the vessel to supervise the work of the stevedore. Therefore, the Third Circuit held that "such observation cannot be used to reimpose the general duty to supervise the stevedore." *Id.*[4] This

> place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them.

Scindia, 451 U.S. at 169-170.

4. The Petitioner incorrectly summarizes the holding in *Derr*. Petitioner asserts that the Third Circuit held that evidence regarding the "custom" of observing loading operations is insufficient to establish liability for conditions created by the longshoremen, leaving open the possibility that actually observing the loading operation in general can establish liability. This is an inaccurate and illogical reading of *Derr*.

holding is in complete accord with the legislative history behind the 1972 Amendments to the Longshore & Harbor Worker's Compensation Act and this Court's decision in *Scindia*.

As previously noted, this Court concluded in *Scindia* that a vessel owner is "entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Scindia*, 451 U.S. at 172. Furthermore, the position advanced by the Petitioner "would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship." *Id.* at 169. As this Court pointed out in *Scindia*, this would "saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Id.* at 1623, *quoting, Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249- 50 n.35 (3d Cir. 1977). Therefore, this aspect of the *Derr* decision is entirely consistent with this Court's holding in *Scindia*.[5]

B. The Petition For Writ Of Certiorari Should Be Denied Because The Present Case Does Not Properly Present For Review The Conflict Between The Third, Fifth And Ninth Circuits Regarding A Shipowner's Liability For Improperly Stowed Cargo; Even Under The Standards Of Care Adopted In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), And *Turner v. Japan Lines, Inc.*, 651 F.2d 1300 (9th Cir. 1981), Summary Judgment Was Properly Granted.

Petitioner asserts that "while, under *Scindia*, a vessel owner may not have a duty to supervise cargo operations while they are in process, . . . the shipowner would have an obligation to inspect the work of a loading stevedore after it is completed to discover any unsafe

5. The Fifth Circuit and the Ninth Circuit Courts of Appeals have never reached this issue. There is no conflict, therefore, regarding this more narrow issue.

conditions which might have been created as a result of that work." *See* Petition at pp. 8-9. According to Petitioner's own argument, however, the alleged unsafe condition in this case (i.e. plastic on the deck) could not be observed or discovered after the cargo was loaded. *Id.* at 14. Therefore, if Petitioner is, in fact, seeking to impose a duty upon the vessel owner to inspect the condition of the cargo after it is loaded, this case does not properly present this issue for review since it does not involve a condition that could have been discovered by a reasonable inspection.

In addition, even under the standards of care adopted in the Fifth and Ninth Circuits, summary judgment was properly granted in this case. In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), the Fifth Circuit Court of Appeals held that a vessel owner has a duty to exercise "due care" before the vessel is turned over to a discharging stevedore "to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety." *Id.* at 850. Accordingly, the Fifth Circuit held that a vessel owner may be liable for injuries resulting from negligently stowed cargo if "a reasonable owner/operator . . . would have perceived the dangers presented" by the condition of the cargo. *Id.* at 852. In other words, the vessel owner may be found liable if it "knew or should have known of the dangerous condition." *Id.* at 850. In addition, in *Turner v. Japan Lines, Inc.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), the Ninth Circuit Court of Appeals held that a vessel owner has "a duty to protect [domestic longshoremen] against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." *Id.* at 1304. As in *Woods*, therefore, the *Turner* Court concluded that a vessel can be held liable if there is "sufficient evidence from which [a] jury could . . . conclude that the vessel knew or should have known" of the danger. *Id.*

In both *Woods* and *Turner*, there was sufficient evidence to establish that the vessel's crew knew, or should have known, of the unsafe condition. In *Woods*, the plaintiff was injured while discharging steel pipes located in the hold of a vessel. Before the discharge operation began, the vessel was notified by the stevedore's superintendent that the pipes represented a "bad stow." *Woods* 873 F.2d at 845. Therefore, the vessel had actual knowledge of the condition involved.

In *Turner*, the plaintiff was injured when a stack of plywood collapsed due to a lack of shoring. The Ninth Circuit found that there was sufficient evidence to support a finding that the shipowner "should have known" of the unsafe condition because the shoring operation would have taken "many hours of work by marine carpenters" and there was evidence that, as a matter of custom, the Captain was responsible for "overseeing the loading operations and particularly for ensuring that the cargo is properly shored." *Turner*, 651 F.2d 1302. The significance of this evidence is better understood after reviewing what is necessary under these holdings for establishing "reasonable care" on the part of a vessel owner and/or what is sufficient for establishing constructive knowledge of a dangerous condition in the shipping industry.

In *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236 (5th Cir. 1981), the Fifth Circuit Court of Appeals set forth a lengthy discussion regarding constructive knowledge on the part of a vessel owner:

> In defining the scope of what the vessel owner "should know" [where a latent, non-obvious condition is involved], we remain cognizant of Congress' abolition of longshoremen's actions based upon unseaworthiness. Congress did not intend that the vessel owner be charged with knowledge of any latent defect on the vessel, since such a theory of liability would approach the unseaworthiness standard. Because it was concerned that courts might continue to hold vessels strictly liable for hazards by

viewing any unseaworthy conditions as negligence, Congress stressed that negligence should be determined by traditional non-maritime standards. The Restatement (Second) criteria of negligence subject a shipowner to liability only if he knows or has reason to know of an unreasonably dangerous condition on the vessel of which the longshoreman is probably not aware and fails to exercise reasonable care to make the condition safe or warn the longshoreman. As explained in *Slaughter v. Ronde*, 390 F.Supp. 637 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975), where a longshoreman was injured by shifting cargo, Congress, through passage of the 1972 Amendments, did not intend to derogate from the maritime law imposing liability on a vessel owner whose officers "see or have actual visual notice of, or ample time to observe, unsafe stevedoring operations" and do not take corrective action. 390 F.Supp. at 640. Heretofore, precedent in this circuit has required a showing of a *real opportunity for knowledge* to be gained during reasonably careful operation of the vessel before it is said that a vessel owner "should have known" of a nonobvious hazard posing danger to longshoremen engaged in stevedoring activities.

Id. at 244 (emphasis added). In addition, in a footnote, the Fifth Circuit continued its evaluation of the term "reasonable care" within the shipping industry:

> A shipowner's liability clearly must extend to those dangerous conditions of which he has actual notice plus those of which he should have notice by an exercise of reasonable care. The meaning of "reasonable care" within the shipping industry must be adduced in light of the special problems arising during the carriage of goods by sea. The reasonable care standard does not include the duty to actively supervise loading work. *Price v. S.S. Yaracuy*, 378 F.2d 156 (5th Cir. 1967). *Slaughter v. Ronde* states,

> "Reasonable care does not require ship's officers to inspect each hold daily to be sure that the 'stevedore has properly performed the work which it was hired to perform and that they inspect so thoroughly that they discover a danger which is not readily apparent and which is not appreciated by the longshoremen themselves.' " 390 F.Supp. 637, 644 (S.D. Ga. 1974) *aff'd*, 509 F.2d 973 (5th Cir. 1975) *(quoting, Williams v. Bowring Steamship Co.*, 1972 AMC 890, 897 (D.Conn. 1972). But if there is evidence that the ship's crew has conducted an inspection which either led to or should have led to the discovery of a perilous condition, the vessel owner may be negligent.

Id. at 244, n.9.

The "reasonable care" standard discussed in *Mallard* supports the holding of the Ninth Circuit in *Turner*. As the Ninth Circuit pointed out, it would have taken marine carpenters "many hours" to construct the proper shoring, the crew had an opportunity to inspect the work, and there was a custom that the master or one of his mates would inspect the work. Therefore, there was "a real opportunity for knowledge to be gained during reasonably careful operation of the vessel." *Id.* at 244.

In the present case, however, there is no evidence that the crew of the M/V PRESIDENTE IBANEZ had this type of "opportunity." There is no evidence that any crewmember observed, or had an opportunity to observe, that plastic had been placed on the deck of the No. 2 hold, nor was there a custom that the vessel's crew would supervise the loading operation. It is true the plastic was obtained from the vessel's supplies, but plastic could be used for a myriad of purposes during the loading of cargo aboard a vessel. As the district court noted, "being the supplier of equipment does not necessarily imply knowledge of its intended purpose." (4a). In addition, there is no evidence that plastic was used in any other hold, or on any other deck, other than the

immediate deck area where Petitioner fell. Furthermore, as Petitioner himself points out, as soon as the first layer of cocoa beans was loaded into the hold, the plastic could not be observed. Therefore, there is no evidence to support a finding that the vessel owner "knew or should have known" of the alleged unsafe condition and the vessel owner would have been entitled to summary judgment even if the case was pending in the Fifth or Ninth Circuits.

CONCLUSION

Although Respondent concurs with Petitioner that there is a conflict among the Circuits regarding a shipowner's liability for improperly stowed cargo, the present case does not properly present this conflict for review. Therefore, Respondent requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix
Testimony of Captain Daniel Cafena

Q. Have you ever seen plastic put on the deck?

A. In any other occasion?

Q. On any occasion with loading the cocoa beans.

A. Never with cocoa beans. Never with cocoa bean. It is not permitted.

Q. Why is it not permitted?

A. Because the cocoa beans are a very delicate cargo, and they could breathe, and the plastic would — they are very humid, moist and the plastic could cause more moisture.

Q. Who makes the decision as to what is put on the deck before the cocoa beans are stowed?

A. The stevedore.

Q. How do you know that?

A. Because it has always been that way. They should know what they have to do, and that is their job.

Q. Now, does your chief mate watch the loading of the cargo?

A. I would say yes, that he would do it, but he can't be attentive to everything that is happening.

* * *

Q. Is it your practice to assign one seaman to watch each hold?

A. No, it's not the practice to assign one man for each cargo. Normally they are watching all the cargo on the ship.

Q. How many holds are on the ship or on the PRESIDENTE IBANEZ?

CAPTAIN CAFENA: Cuatro.

THE INTERPRETER: Okay. Four.

Q. So that would it be fair to say — strike that. You have three men, three seaman and a mate, an officer — you have three seaman and an officer assigned to watch the four cargo holds?

MR. WRIGHT: Objection.

Q. You can answer.

A. Yes. Because many strangers or strange people could enter. There could be people who were trying to stow away drugs or stowaways.

Q. And those men will move from hold to hold during the course of the whole cargo operation watching what is happening?

A. Affirmative. Yes.

* * *

Q. Let me rephrase the question. When the ship was in Guayaquil in July of 1989, whatever the date, would the practice that you just described have been the practice that was followed on the ship?

A. Please remind me. What practice are you referring to?

Q. The practice of having the crew members watch the loading and to watch to see what was placed on the deck.

MR. WRIGHT: Objection.

A. The practice is this. To take care of the cargo and to make sure that no strange people come on the ship. Strangers.

Q. Would that have been the practice, to watch the cargo being loaded on the ship in Guayaquil, in July of 1989?

THE INTERPRETER: He says say it again slower.

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

MR. WRIGHT: Objection.

A. Affirmative. And he would have advised me or one of the ship mates.

MR. WRIGHT: Chief mate.

THE INTERPRETER: Chief mate. I'm sorry.

Q. And if you had been advised, you would have directed that it be removed?

A. Immediately.

* * *

Q. In loading, unloading cocoa beans in Philadelphia in July of 1989, how many members of the crew would you have on deck — did you have on deck observing the unloading operation?

A. I had three sailors and one officer, watching not just the operation, but taking care of the whole ship.

Q. Going back to the loading of cocoa beans in Guayaquil, if plastic was placed on the deck underneath the cocoa beans, who would have ordered that plastic, if you know?

A. Who would have ordered to put the plastic?

Q. No. Yes first.

A. The stevedores.

Q. Who would have purchased the plastic?

A. The ship would buy the plastic. We purchase all of the materials for the operation. The plastic, the wood.

* * *

Q. Assuming that cocoa beans have been loaded on

board the PRESIDENTE IBANEZ for the voyage in question, and those cocoa beans had been loaded in Guayaquil, who would have loaded those cocoa beans?

A. The stevedores.

Q. And, captain, who made the decisions concerning what, if anything, would be placed underneath that cargo of cocoa beans?

A. The stevedores.

Q. Captain, can you tell the jury – strike that. Captain, have you ever observed cargo of cocoa beans loaded – being loaded by stevedores?

A. Yes. By the stevedores, yes.

Q. And what, if anything, is normally placed underneath those – that cargo of cocoa beans?

THE INTERPRETER: The "what if anything" –

A. Oh, what do they put in?

Q. Yes.

A. They put what they are supposed to put in this case, which would be wood and then paper.

Q. And then the cocoa beans are placed on top of the paper?

A. Always on the paper.

Q. Have you ever seen a stevedore loading – stevedore use plastic in the loading of cargo –

A. No.

Q. – at all or just underneath the cargo?

A. In this case, I have never seen a stevedore use plastic when loading cocoa beans. The ship mate would have ordered him to stop it immediately.

Q. Okay. We'll get to that in a second, captain. Have you

ever seen plastic used in connection with the loading of other cargo on board a ship?

A. Affirmative.

Q. How about on board the PRESIDENTE IBANEZ?

A. Yes. But carrying, for example, in Houston, corrosive drums. IMO cargo.

MR. WRIGHT: IMO cargo. All capital letters.

Q. Now, captain, at any time during loading of cocoa beans in Guayaquil, were you ever aware that the stevedore was using plastic underneath the cocoa beans?

MR. SOVEL: And by that you mean him personally?

MR. WRIGHT: Yes.

A. Never.

* * *

Q. Captain, in 1989, did you have a practice for reporting problems that your officers or crew members might observe during the course of loading on board the PRESIDENTE IBANEZ?

A. I always had.

Q. And what was that practice?

A. To observe, to make sure that there would be no robberies and to protect the ship.

Q. What would be the practice if your officers or crew members observed a problem in the manner in which the cargo was being loaded?

A. They would advise me immediately. That is a practice.

Q. And if a stevedore in Guayaquil had placed plastic down on one of the 'tween decks on the PRESIDENTE IBANEZ and then placed a cargo consisting

of cocoa beans on top of that plastic, is that something that would have been reported to you?

MR. SOVEL: Objection.

A. Immediately.

Q. And why would that have – why would that be something that would be reported to you?

MR. SOVEL: Objection.

A. Because it's not usual – because you should not be plastic with the cocoa beans.

Q. And, captain, why is plastic not ordinarily used in the loading of cocoa beans?

A. Because the plastic produces moisture and cocoa beans go bad with the moisture.

Q. Are you aware of any other problems arising from the use of plastic with cocoa beans?

A. Aparts from the moisture, no.

Q. Okay. Captain, if you – strike that.

Captain, were you also on board the vessel during the course of discharge operations in Philadelphia in July of 1989?

A. Affirmative.

* * *

Q. Now, you testified that the longshoremen made the decision to put paper and wood underneath the cocoa beans?

A. Affirmative.

Q. Isn't it correct that if they did not do that, you would require them to do that?

MR. WRIGHT: Objection, but –

A. They have to do it.

Q. So the ship requires them to do that?

MR. WRIGHT: Objection.

A. The stevedores have to fulfill their jobs. If not, the agency would throw them out.

Q. But they do not have authority to decide not to put the wood or paper under the cocoa beans, do they?

MR. WRIGHT: Objection.

A. They have the decision to do it.

Q. Well, do they have – do they have – can they make a decision not to do it?

A. If they did it, it would not be correct.

Q. And what would you do?

A. This case has never happened to me.

Q. Would you – if you learned that they were not doing it, would you not tell them to do it?

MR. WRIGHT: Objection.

A. I would have told them.

Q. And would you not have insisted that they do it?

MR. WRIGHT: Objection.

A. Normally, we don't repeat the order. If I would have told them – I've never had a case like this happen to me.

Q. Is what you are saying that if you tell them, they will do it?

A. Possibly they would do it.

Excerpt from Court of Appeals Appendix
Testimony of Joseph Fisher

Q. Do you know if plastic was used in any other hatch aboard this vessel?

A. I don't know.

Q. Did you work at any other hatch?

A. Yes.

* * *

Q. When you looked down at the exposed area, could you see the plastic?

A. I don't understand what you mean.

Q. After Mr. Howlett fell, did you go over to that area?

A. Yes.

Q. And when you looked down, you could see Mr. Howlett on the ground?

A. Yes.

Q. When you looked at the deck area, could you see plastic?

A. Yes.

Excerpt from Court of Appeals Appendix
Testimony of Raymond McMullen

Q. How did you first find out that Mr. Howlett was involved in an accident?

A. I believe he came up to me and told me that he had hurt himself.

Q. And where were you when he told you this?

A. I believe I was on the deck.

* * *

Q. Did you conduct any type of investigation, talk to anyone else who was in the hold, or anything else to find out what happened?

A. I just looked down the hatch and seen plastic laying on the ground. I didn't talk to no one.

* * *

Q. As ship boss, you were also responsible for overseeing what was going on in the other hatches?

A. Yes.

Q. Do you know if there was plastic used in the other hatches?

A. I don't remember.